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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-49

JOSEPH LISCHKO,
Petitioner,

vs.

ROBERT J. GALLI, Sheriff of Washoe County,
State of Nevada,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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SUMMARY OF OFFICIAL AND UNOFFICIAL REPORTS

Joseph Lischko, defendant in Action No. 75-2525, was convicted on the 4th day of February, 1970, in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, and thereafter on March 12, 1970, was sentenced by the above entitled Court to serve a term of twenty years in the Nevada State Prison. Lischko had retained counsel for the trial of his case. Thereafter, through ap-

pointed counsel, Lischko appealed his conviction to the Supreme Court of the State of Nevada and his conviction was upheld before that Court. 87 Nev. 493, 489 P.2d 80 (1971). (Appendix A to this petition)

On July 20, 1972, through John C. Bartlett, newly retained counsel, Lischko filed a petition for post-conviction relief, claiming that his constitutional rights of due process and his 6th Amendment right to have assistance of counsel for his defense were violated. A hearing was had upon this petition and on October 3, 1972, the Honorable Emile J. Gezelin, Judge of the District Court, entered his Decision, Findings of Fact, and Conclusions of Law and ordered that defendant be granted a new trial on the grounds that his counsel at the trial had failed to inquire and investigate facts necessary and crucial for the defense of the defendant, to-wit, that no kidnapping ever existed but that the entire matter was the result of a hoax. (Appendix B to this petition)

Thereafter, the State of Nevada took an appeal to the Nevada Supreme Court, which on a four to one decision reversed the trial judge in Warden v. Lischko, 90 Nev. 221, 523 P.2d 6 (1974), which opinion was filed on June 10, 1974. (Appendix C to petition)

Defendant Lischko filed a Petition for Rehearing before the Nevada Supreme Court, which petition was denied on the 6th day of August, 1974. Lischko then elected to seek a Writ of Habeas Corpus from the United States District Court for the District of Nevada, being Action No. R-74-118-BRT in that

Court. On March 24, 1975, the Honorable Bruce R. Thompson, United States District Judge, denied the Writ for Habeas Corpus, (Appendix D to petition) and thereafter Lischko took an appeal to the 9th Circuit Court of Appeals. On April 14, 1976, that Court entered its order affirming the Decision of Judge Thompson, denying the Petition for a Writ of Habeas Corpus. (Appendix E to petition) A Petition for Rehearing and Suggestion for Rehearing En Banc was filed and the latter motion denied by date of June 17, 1976. (Appendix F to petition) Subsequently, and on June 25, 1976, an order staying issuance of mandate was issued by the above entitled Court providing that the issuance of mandate would be stayed provided appellant filed a petition for Writ of Ceritorari, to be filed on or before July 19, 1976 before the above entitled Court.

STATEMENT OF GROUNDS INVOKING JURISDICTION OF THIS COURT

The date of Judgment and Entry of the Judgment sought to be reviewed is April 14, 1976. The date of the Order denying the rehearing is June 17, 1976. The date of the Order staying issuance of mandate and setting July 19, 1976 for the time for petitioner to file this Petition for Writ of Certiorari is June 25, 1976.

The statutory provision believed to confer jurisdiction in the above entitled Court to review this Judgment is 28 U.S.C.A. 2254(1).

QUESTIONS PRESENTED FOR REVIEW

The basic question presented for review is whether or not the defendant Lischko was denied his constitutional right to the effective assistance of counsel at his original trial before the state District Court in and for the County of Washoe, State of Nevada.

To reach the basic question, the following issues must also be resolved.

A. Is it constitutionally permissible for the Nevada Supreme Court in reviewing a trial judge's decision that a defendant did not have constitutional "assistance of counsel for his defense" to apply the standard that effectiveness of counsel must reduce the trial to "a sham, a farce or a pretense" before a defendant can establish a violation of his 6th Amendment rights?

B. In ruling upon the question of effectiveness of counsel, is it constitutionally permissible for the Nevada Supreme Court to apply a presumption that counsel "fully discharged his duties", and require further that this presumption can only be overcome by "strong and convincing proof to the contrary".

C. Did the Federal District Court for Nevada err in not following the Findings of Fact made by the trial judge in the State of Nevada as set forth in Appendix B?

CONSTITUTIONAL PROVISIONS INVOLVED

"Amendment VI. Rights of Accused in Criminal Prosecutions

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by

an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been prevously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S.C.A. Const. Amend. 6, p. 4.

"Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S.C.A. Const. Amend. XIV §1, p. 33." (Only Section 1 is deemed pertinent to this issue)

STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO QUESTIONS PRESENTED

The jurisdictioin of the Court of first instance was based upon 28 U.S.C.A. §1331(a).

It is and always was defendant's version to his counsel that he picked up Dean Petersen pursuant to the instructions of Faye Petersen Johnson given

to him in Las Vegas the night before the alleged kidnapping. It is his contention that Faye Petersen Johnson, driving a black Lincoln automobile, picked him up in front of a service station in Las Vegas the night before the alleged kidnapping and drove with him in the car while explaining to him where to pick up Dean Petersen. Dean Petersen was, in fact, at the place and time Faye Petersen Johnson advised defendant that he would be. At that meeting, Faye Petersen Johnson advised Lischko that she would meet him in Reno at the airport the morning after Lischko arrived in Reno with Dean Petersen. The defendant claims he knew the Petersen family, including the alleged victim, Dean Petersen, and Faye Petersen Johnson for many years prior to this incident and knew as well many other members of the Petersen family, including one Sam Zona, step-father to the Petersen children.

On the trip from Las Vegas to Reno, the defendant, the victim, and a co-defendant named McCoole stopped in Beatty, Nevada, where the alleged victim and the co-defendant went to a grocery store to purchase food and beverages. During this time, the defendant showed a service station attendant through the Winnebago motor home. The identity of the attendant was unknown.

Dean Petersen was picked up at the time and place Faye Petersen Johnson advised the defendant he would be; Faye Petersen Johnson arrived at the Reno airport where she and the defendant met in broad daylight with no subterfuge the morning of

the day that defendant arrived in Reno with Dean Petersen. Faye Petersen Johnson advised defendant at this meeting to "sit tight" and if anything went wrong, her attorney, Louis Weiner, would look out for defendant and that defendant need not worry but should not get Faye Petersen Johnson involved in any way in this hoax kidnapping. At the trial, Faye Petersen Johnson testified that the defendant told her when he met her at the airport, "You got me into this mess, now get me out of it". She was not cross-examined on this matter by counsel for Lischko.

Prior to the alleged kidnapping, the step-father, mother, sister-in-law and a brother of Dean Petersen and Faye Petersen Johnson sued Dean and Faye Petersen in the District Court in and for the County of Clark, State of Nevada, requesting an accounting from Dean and Faye Petersen from several family owned corporations that were managed by Dean and Faye Petersen.

The defendant retained as counsel one Carl Martillaro the next day after his arrest, paid Martillaro a substantial retainer and told him at that time that the entire kidnapping was a hoax. According to Martillaro, the defendant never backed away from that position.

Although the defendant told the entire story to Martillaro when he first retained him, Martillaro did not obtain an investigator in the Las Vegas area until some three to four months thereafter and never really made a good investigation of the defense of

hoax which was the only defense defendant had to this charge of kidnapping.

The police report of the Las Vegas Police Department indicated that Mary Petersen, wife of Dean Petersen, reported the kidnapping on 10/10/69 at 12:30 A.M. At the trial of the case, the prosecution witnesses testified that the alleged kidnappers called Mary Petersen, who called Faye Petersen Johnson, who called Louis Weiner, who called the police department to report the kidnapping. No mention was made of the police report of the Las Vegas Police Department at the trial of this case nor is there any indication that attorney Martillaro discovered the same prior to trial. A prompt investigation of the circumstances of this case would have discovered the following significant facts.

1. Whether Faye Petersen Johnson made reservations on the airlines prior to many calls to Mary Petersen regarding a kidnapping. If she did, this would confirm the fact that she was involved in a hoax. By the time attorney Martillaro engaged the detective, the airline passenger lists and reservation information had been destroyed, since more than 90 days had passed.

2. The testimony of the witness, Brady, confirming the fact that the defendant was picked up in front of a service station the night before the alleged kidnapping by a lady driving a black Lincoln sedan.

3. The parents and a brother of Dean and Faye Petersen Johnson could have been subpoenaed to prove, despite Dean's denial, that the defendant

Joseph Lischko knew Dean before the kidnapping and, in fact, knew him well.

4. The identity of the service station attendant in Beatty could have been ascertained. Subsequent investigation to learn the name and whereabouts of this person have been frustrated because he was a temporary summer employee, paid in cash and not listed by his employer as an employee because of the complex bookkeeping problems involved. The chance of finding such an employee now are very remote whereas prompt investigation would certainly have revealed who this was.

5. The defendant asked his counsel to permit him to take a polygraph test and the trial judge took judicial notice of the fact that this procedure was used by the Washoe County District Attorney's office in evaluating cases. His counsel advised him not to have any such test and thereby deprived this defendant of an opportunity to clear himself before trial.

6. A note was written to defendant by his co-defendant McCoole, when they both were in jail. Although attorney Martillaro denied knowing of this note, the original of this note was in the hands of the Public Defender's office who was defending the co-defendant, McCoole. The note is set forth herein;

Fri Nov 21 10:20 P.M.

> Joe—If things don't take a turn for the better damn soon regarding bail or attorneys or possible negotiations on the outside, I suggest we speed things up by making some sort of deal with the

D.A. by telling him what really happened—Petersen & yourself had a financial agreement to set up a phoney kidnapping where you two would split—did not know how much money was involved—& pay me $1,000.00 for being the driver —This way Petersen would obtain some tax-free $ from his company & you would be reimbursed for your being close-mouth regarding the real-estate deal or what-ever it was that he was involved in 5 yrs. ago, the details of which I know nothing about—There were no weapons involved whatsoever, no assault & no so-called robbery—However, it seems as if Petersen had this whole thing planned from the beginning as a double-cross in order to get you put away to close your mouth permanently regarding what you know about his past financial involvements and I was just caught in the middle—He drank our booze and ate our food on the way up from LV expressing his desire for the companionship of the pre-arranged females—He obviously had the thing planned with his sister to notify the police as soon as he (and/or you) called demanding the ransom—Then he just waited until I left to meet you & made his dramatic & phony escape, taking along the cuffs we had in the camper to make it look good & called the cops, knowing all the time that you had been watched all day & we both would be arrested—Then he told them those lies about being assaulted and robbed—in any event, I feel we should demand a change of venue when trial comes up because of public opinion up here—also if Petersen is as dis-liked as you seem to think he is in L.V., we would be better off being tried there, because they would be more inclined to believe how he could have

set this whole thing up because of his past shady $ deals—send me your answer on the back of this so I can destroy it myself—I can't see why the judge & jury won't believe this since it is the truth—otherwise, why would you be exposing yourself all day & why did I let him get to know me well enough to identify me? If it had been a real kidnapping we sure as hell would have at least blind-folded him and anyone who was going to make the money demand would have been a lot more careful and discreet than you were—make sure you reply on here so I can destroy it!! I still haven't been able to contact Ross—what happened when you went out late last night?

Certainly any investigation of counsel for the defendant should have revealed this note and its usability is obvious particularly since attorney Martillaro admitted his decision as to whether or not to put the defendant on the stand would have been different had he had the benefit of this note.

ARGUMENT

The law as to what tests should be used by the Courts, both State and Federal, to decide whether a defendant's 6th Amendment rights have been violated by ineffective assistance of counsel for his defense has for several years been in conflict, both in the State and Federal Courts. The Supreme Court has not established any clear standards for courts to follow in basing all claims of ineffective assistance of counsel. See *McQueen v. Swenson,* 498 F.2d 207, 214 (1974). That such guidance is needed is demonstrated clearly by the instant case. Here the Nevada Court uses the phrase "sham, farce or pretense". The Federal District Court in this case gave lip service to the concept that the defendant had to show "that he had counsel who was not reasonably likely to render and did not render reasonably effective assistance". This rule finds support in *Brubaker v. Dickson,* 310 F.2d 30 (9th Cir. 1963) and *Beasley v. U.S.,* 491 F.2d 687 (5th Cir. 1974) Many older Federal cases use the words "farce and mockery of justice" which would appear to be the thought contained in the test used by the Supreme Court of the State of Nevada.

The importance of the United States Supreme Court decision clarifying the test to be used becomes even more essential when added to the test used by the Nevada Supreme Court in this case, the presumption that counsel fully discharged his duties. It is true that a presumption of competency of counsel has long been a part of the judicial system, both Federal and State, and some showing would be required by a defendant to overcome that presumption. A reading of such cases would seem to indicate that such a presumption outside of the State of Nevada simply means that a showing had to be made by the defendant of something that his counsel did or failed to do before the Courts would consider the question of ineffective assistance of counsel. Most cases do not define the burden of proof but those that do indicate that a preponderance of the evidence is a proper burden. See *Crowe v. South Dakota,* 484 F.2d 1359, 1361 (8th Cir. 1973) and *McQueen v. Swenson, supra.* A clarification of what this presumption means in relation to the burden of proof required to overcome it is another reason why this Court should grant certiorari.

The third reason involves the requirement of the State of Nevada that the presumption used by them which, it is submitted, is different from any other presumption in any other state or the Federal courts, can only be overcome "by strong and convincing proof to the contrary". This extraordinary requirement for a defendant in a criminal case so far as petitioner's research indicates is found only in the State of Nevada. If Nevada is allowed to do this, certainly all the states could do it and the 6th Amendment right to the effective assistance of counsel would be, if not destroyed, diminished in a manner that would destroy the ideal of the founders of this country. If this added burden can be put upon a defendant choosing to exercise his constitutional right, why can it not be put upon a defendant exercising any

other constitutional right? If a state can make it this difficult to assert and protect the right to effective assistance of counsel, why cannot a state make the presumption of competency of counsel a conclusive one and thus destroy the 6th Amendment rights of all people living in that state?

A fourth reason for granting the Writ is to give citizen, Joseph Lischko, a full and fair trial before a jury of his peers, and give him the constitutional right to effective assistance of counsel which he did not receive in this case. In *McQueen v. Swenson, supra,* the United States Court of Appeals for the 8th Circuit held that a defense counsel who failed to do no other investigating of a murder charge than to interview the defendant, failed to give effective assistance of counsel. Can it be said that counsel who failed to investigate an affirmative defense, where that defense was the only defense to the charge, and having failed to investigate made an uninformed decision not to put his client on the stand to relate this affirmative defense of a hoax where this defendant was the only one who knew the details of this defense is any more effective than counsel in the *McQueen* case?

CONCLUSION

This Court should grant the Writ of Certiorari requested, so that the 6th Amendment rights under the Federal Constitution which under the 14th Amendment were given to all citizens appearing before State Courts as well as the Federal Courts can be made clear and uniform. Equally important, certiorari should be granted so that the petitioner in this proceeding can at long last have an opportunity to present his defense to a jury of his peers.

Dated, Reno, Nevada,
July 12, 1976.

Respectfully submitted,
VARGAS, BARTLETT & DIXON,
JOHN C. BARTLETT,
Attorneys for Petitioner.

(Appendices Follow)

APPENDICES

Appendix "A"

In the Second Judicial District Court of the
State of Nevada in and for the
County of Washoe

No. 6238

October 6, 1971 489 P.2d 89

Joe Lischko,
Appellant,
vs.
State of Nevada,
Respondent.

OPINION

Per Curiam:

The appellant, who was charged by indictment, stands convicted of first degree kidnaping. He asks us to set aside his conviction for three reasons. First, because the trial court refused his request to order the district attorney to supply him with a list of witnesses to be called during presentation of the State's case in chief. When an accused is charged by indictment, a list of witnesses need not be supplied. Smithart v. State, 86 Nev. 925, 478 P.2d 576 (1970); Mathis v. State, 82 Nev. 402, 419 P.2d 775 (1966). Second, because evidence suggesting the perpetration of another offense by appellant was received. As to this, no objection was interposed by trial counsel and the error, if any, was waived. Wilson v. State, 86 Nev. 320, 468 P.2d 346 (1970); Smithart v. State, supra.

Third, because the trial court denied his motion, made during trial, to produce statements, if any, submitted to the prosecution by one Robert Sheridan. Sheridan was not called as a witness. Cf. Mears v. State, 83 Nev. 3, 422 P.2d 230 (1967); Walker v. State, 78 Nev. 463, 376 P.2d 137 (1962); State v. Bachman, 41 Nev. 197, 168 P. 733 (1917). Moreover, the record does not show that Sheridan gave statements or evidence, or that he even possessed relevant information.

Affirmed.

Appendix "B"

No. 279498 Dept. No. 5

In the Second Judicial District Court of the
State of Nevada in and for the
County of Washoe

Joseph Lischko, Petitioner,
vs.
State of Nevada, Respondent.

[Filed Oct. 3, 1972]

DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Joseph Lischko, the above-named defendant, was indicted by the Grand Jury of Washoe County on October 23, 1969 of the crime of Kidnapping First Degree. A co-defendant, William George McCoole was also charged in the same indictment. Both defendants entered pleas of not guilty. Defendant Lischko was represented by Carl Martillaro, Esq. of Carson City, Nevada, and McCoole was represented by other counsel.

A trial by jury was begun on January 26, 1970. The jury returned a verdict of guilty against both defendants on February 4, 1970. Neither defendant testified during the trial or presented any evidence in defense of the charges. Lischko was sentenced to a term of twenty years in the Nevada State Prison. A

court-appointed attorney appealed his conviction to the Nevada Supreme Court, and that court affirmed the lower court conviction. *Lischko v. State of Nevada,* 87 Nev. 493.

On July 20, 1972, defendant Lischko filed a Petition for Post Conviction Relief. The grounds asserted therein by the petitioner were not urged in the appeal from judgment in the Nevada Supreme Court. Thus, this Court has proper jurisdiction to hear this matter and render a decision thereon. NRS 177.335.

Relief in such proceedings may be granted when there exists evidence of material facts not heretofore presented and heard, which may require vacation of the conviction or sentence in the interests of justice. STANDARDS RELATING TO POST CONVICTION REMEDIES, ABA Institute of Judicial Administration (1967) p. 9.

Pursuant to NRS 177.365, an Evidentiary Hearing was ordered and it was held on September 6, 1972.

The Petition for Post Conviction Relief requests that this court set aside the conviction and sentence imposed and grant the defendant a new trial on the grounds that:

1. The conviction was obtained and sentence imposed in violation of the Constitution of the United States and Nevada in that the petitioner was deprived of his right to constitutional due process as set forth in Article I, Section 8 of the Nevada Constitution and violation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

2. That petitioner was deprived of his right "to have the assistance of counsel for his defence," in

that although he had competent counsel, his counsel acted incompetently when he did not permit the defendant to take the stand, and, further, persuaded the defendant to not take a lie detector test to ascertain the truth of the defendant's factual story that the alleged kidnapping was nothing but a hoax.

3. That certain state witnesses (Faye and Dean Petersen) lied concerning material facts during the trial.

4. That defendant's counsel never permitted the defendant to tell his story to the jury.

5. That defendant's counsel never cross-examined the Petersens in a way to implicate them although the defendant had told his attorney that the Petersens were completely implicated in the hoax.

6. That the truth of the defendant's story of an alleged hoax is supported by the results of two lie detector tests and a truth serum test administered and arranged for by his present attorney and the office of Washoe County District Attorney.

Several documents and papers were admitted in evidence on behalf of the petitioner and the State during the course of the hearing. In addition thereto, the Court hereby orders admitted into evidence (as stipulated by counsel) petitioner's Exhibit "C" which consists of certain written notes passed between defendants Lischko and McCoole during their confinement in the County Jail previous to the original trial, and petitioner's and State's joint Exhibit "D" which is a copy of the Las Vegas Police Department Report of the crime.

The principal allegations in the Petition for Post Conviction Relief are that the petitioner was deprived of effective assistance of counsel because of counsel's failure to thoroughly consider and present counsel's pre trial information of petitioner's background' acquaintanceship and personal relationships with the Petersens; counsel's failure to permit the defendant to take the stand to tell his story of the hoax; that counsel failed to properly investigate and ascertain relevant facts previous to trial in order to impeach certain statements made by the Petersens during the trial.

> "Although the determination of whether the demands of due process have been met in a particular case is always a 'question of judgment and degree' to be answered in light of all of the circumstances and with a view to 'fundamental fairness' (citing cases), certain general standards have evolved for the aid of the Court making this determination. *Fundamental among these is that which places upon counsel the duty to conduct careful factual and legal investigations and inquiries with a view to developing matters of defense in order that he may make informed decisions on his client's behalf both at the pleading stage (citing cases) and at trial."* (Citing cases) (Emphasis supplied) *In re Saunders,* 2 Cal. 3d 1033, 472 P.2d 921, 88 Cal. Reporter 633, 638.
>
> "If counsel's failure (to undertake such careful inquiries and investigations) results in withdrawing a crucial defense from the case, the defendant has not had the assistance to which he is entitled." *In re Saunders,* supra, citing; *People v. Ibarra,* 386 P.2d 487; *In re Williams,* 460 P.2d 984; *Brubaker v. Dickson,* 310 F.2d 30.

This Court realizes that there is a distinction between cases involving a failure to make a careful factual inquiry and investigation to present an adequate defense, and those cases where counsel having made such inquiries and investigation, makes tactical or strategic decisions, whether wise or unwise, when viewed with the benefit of hindsight. The present matter before the Court, falls into the category of the first class of cases.

It was the Judge of this court who presided at the original trial. The impressions received at the original trial and which are now supplemented with the allegations of the petition, together with evidence presented at the evidentiary hearing convince the Court that the matters complained of resulted from a failure on the part of counsel to adequately inquire and investigate facts and circumstances in order to be in a position to make informed decisions on behalf of his client. Counsel's decisions based upon lack of information denied the petitioner the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.

There are, of course, disputed facts present. The petitioner stated that he requested of his counsel to take a lie detector test to establish in the mind of his attorney that his story of the hoax was the truth. His attorney, petitioner further testified "seemed to brush it off, and said it wasn't necessary. He more or less brushed it off." (Transcript, p. 16, lines 3-8) Martillaro testified he does not recall being asked. (Tran-

script, p. 38, lines 8-11; p. 44, line 20) Counsel admitted, however, during the hearing that even at the beginning of the trial and during the trial the petitioner's story was one *"that he never backed away from"* and that he was *"firm"* in the assertion of this defense. (Transcript p. 37, lines 29-30; p. 38, lines 1-2)

In any event, the evidence is clear, and the State admits that the petitioner has taken two lie detector tests and a truth serum test. Two of the experts who administered the tests testified that in their opinion the petitioner was telling the truth and not fabricating a story. (Testimony of Russell Jones, Transcript beginning on p. 19, and testimony of F. William Allport, M.D., p. 25).

It is true that in a criminal trial, lie detector test results are not admissible in evidence except by stipulation. This Court, however, must take and does take judicial notice of the fact that lie detector tests are widely used by and the results thereof heavily relied upon generally by prosecutors, defense attorneys and law enforcement agencies. The office of District Attorney of Washoe County is no exception.

The results of these tests and the testimony of the experts who administered them weigh in favor of the petitioner's allegations of the petition. The petitioners testimony at the evidentiary hearing was not rebutted by the State. While it is true that the District Attorney objected to oral testimony adduced from the petitioner, this objection was overruled because the evidence was relevant and necessary in order for the

Court to have sufficient information before it to determine whether the demands of due process in this case were met. What counsel knew or was told, and what inquiry and investigation were carried out concerning the relevant facts was highly important to the Court to enable it to arrive at a decision with "fundamental fairness".

Furthermore, the characteristics of a post conviction remedy partakes of some attributes of both civil and criminal proceedings.

> *"The procedures should be appropriate to the objectives of the remedy.* While the post conviction proceeding will necessarily be separate from the original prosecution proceeding for many purposes, the post conviction stage is, in a sense, an extension of the original proceeding and should be related to it insofar as feasible."
>
> ABA STANDARDS RELATING TO POST CONVICTION REMEDIES, Institute of Judicial Administration, p. 7 (1967) (Emphasis supplied)

There is no evidence in the record of this hearing which establishes a compelling reason which was reached through independent inquiry and investigation by counsel to not permit the petitioner to take the stand and recount his defense to the jury from which he "never backed away from". Failure to put the petitioner on the stand resulted in a complete failure to present any defense in the case, and thus the petitioner was not afforded the effective assistance of counsel to which he is entitled. The cause of the accused was not presented to the jury. It was not a trial contemplated by the due process clause of the Constitution.

> "It is counsel's duty to investigate carefully all defenses of fact and law that may be available to the defendant, and if his failure to do so results in withdrawing a crucial defense from the case, the defendant has not had the assistance to which he is entitled." *People v. Ibarra,* 34 Cal. Rptr., 863 (1963); 386 P.2d 487; See also: *In re Saunders,* 472 P.2d 921.

It was counsel's duty to further investigate the story of the hoax, the long acquaintance of the petitioner, the victim and his sister, and other matters now being questioned. This Court, of course, cannot say what such further investigation may have revealed. However, failure to make truly diligent efforts to follow up the leads of information in his possession, counsel precluded himself from making informed decisions for an effective trial. What the Federal Court said in *Brubaker,* supra, equally applies here. The crucial defense of "a hoax" was "withheld not through deliberate, though faulty judgment, but in default of knowledge that reasonable inquiry would have produced and hence in default of any judgment at all."

From a careful consideration of the entire record, this Court concludes that the relief sought in the Petition for Post Conviction Relief should be granted.

Accordingly, the Court Makes the Following Findings of Fact and Conclusions of Law, to wit:

Findings of Fact

The Judge of this Court was the presiding Judge at the original trial of the petitioner, Joseph Lischko,

(defendant in the criminal proceedings) and takes judicial notice of all matters which occurred at said trial for purposes of making these Findings of Fact and Conclusions of Law.

I.

That counsel for petitioner was fully advised, prior to trial, of the details of petitioner's defense which was that he claimed there could have been no kidnapping bcause the alleged victim went voluntarily with the petitioner and his co-defendant; that the kidnapping was a hoax instigated by the sister of the victim; that the petitioner was hired to perpetrate the hoax.

II.

That petitioner's counsel before the criminal trial failed to undertake appropriate inquiries and investigation to determine the reliability of petitioner's claimed defense; that this resulted in the withdrawal from the case of a crucial defense; that because of the withdrawal of the crucial defense, the defense actually offered was insubstantial.

III.

That petitioner did not take the stand in his own defense; that the claimed defense of the petitioner was, therefore, never presented to the jury.

IV.

That since his conviction and just previous to this post conviction hearing, petitioner undertook a truth serum test and two polygraph tests; two experts, one

of whom administered the truth serum test and one a polygraph test testified that the petitioner "passed" them; that the petitioner was never given a polygraph test before the original trial.

V.

The pre-trial investigation for evidence to impeach statements made at the trial by State's witnesses (the victim and his sister) was inadequate, and counsel, as a result of this inadequacy, was not informed to properly assist; that the petitioner, the victim, and his sister had been longtime acquaintances, but at the trial, the victim testified he had never seen Joe Lischko before; that inadequate investigation precluded Lischko's attorney to be informed to properly cross-examine on this fact.

VI.

That an adequate fee was paid to petitioner's counsel to defray expenses of a proper investigation.

VII.

That certain written notes (Exhibit "C" in evidence) were exchanged between Lischko and co-defendant McCoole while in the County Jail awaiting trial, the contents of which corroborate the claimed defense of a hoax by petitioner; that petitioner's counsel did not know the exisence of these notes.

Conclusions of Law

From the foregoing facts, the Court makes the following Conclusions of Law, to wit:

I.

That as a result of counsel's failure to adequately inquire and investigate facts the petitioner's crucial defense was withdrawn, and further resulted in inadequate cross-examination of state witnesses, and, therefore, the petitioner did not have the effective assistance of counsel, in violation of his rights under the Sixth and Fourteenth Amendments of the Constitution of the United States.

II.

That the petitioner, Joseph Lischko, should be granted a new trial in Action No. 257329 entitled "State of Nevada, Plaintiff, vs. Joseph Lischko, Defendant", and the judgment of conviction and sentence heretofore imposed should be set aside and vacated.

Let An Order Be Entered Accordingly.

ORDER

IT IS HEREBY ORDERED AS FOLLOWS:

1. That the Judgment of Conviction heretofore entered and the Sentence imposed is hereby vacated and set aside.

2. That petitioner, Joseph Lischko be, and he is granted a new trial in Action No. 257329.

3. That the said Joseph Lischko be returned forthwith by Carl Hocker, Warden of the Nevada State Prison to the custody of Robert J. Galli, Sheriff of Washoe County, Nevada.

4. That the said Joseph Lischko be released on bail by Robert J. Galli, Sheriff of Washoe County upon

the posting of bail by the petitioner in the sum of $5,000.00.

5. That Robert E. Rose, District Attorney of Washoe County, forthwith take steps to set a date for the new trial at the convenience of the Court and respective counsel.

Dated this 3rd day of October, 1972.

/s/ Emile J. Gezelin
Emile J. Gezelin
District Judge

Appendix "C"

In the Second Judicial District Court of the
State of Nevada in and for the
County of Washoe

No. 7088

June 10, 1974 523 P.2d 6

Warden, Nevada State Prison,
Appellant,
vs.
Joseph Lischko,
Respondent.

Opinion

By the Court, Thompson, C.J.:

This appeal by the State is from an order of the district court granting post-conviction relief in the form of another trial. That court found that Joseph Lischko was denied the effective assistance of counsel in connection with his 1970 trial upon the charge of kidnapping. He was then represented by privately retained counsel. A jury found him guilty as charged and judgment was duly entered upon the verdict. Different counsel was appointed to prosecute an appeal to this court. The judgment of conviction was affirmed. Lischko v. State, 87 Nev. 493, 489 P.2d 89 (1971). On appeal, he did not assert that he had been denied the effective assistance of counsel at trial. The present post-conviction proceeding was instituted through still

another attorney of Lischko's choice, and after an evidentiary hearing thereon, resulted in the order granting another trial from which the State has taken this appeal.

1. Although the district court properly may have refused to entertain Lischko's post-conviction petition because of his failure to urge the incompetency of trial counsel as a claim of error upon direct appeal,[1] it chose instead to conduct an evidentiary hearing and rule upon the merits. That choice fell within its discretionary power. Consequently, we must review the merits also and decide, as a matter of law, whether due process was denied Lischko at trial by reason of the alleged ineffective assistance of counsel.

2. The standard by which such a claim is to be tested is whether the effectiveness of counsel was of such low caliber as to reduce the trial to a sham, a farce, or a pretense. Layton v. State, 87 Nev. 598, 602, 491 P.2d 45 (1971); Smithart v. State, 86 Nev. 925, 931, 478 P.2d 576 (1970); Bean v. State, 86 Nev. 80, 92, 465 P.2d 133 (1970). It is presumed that counsel fully discharged his duties, and that presumption can only be overcome by strong and convincing proof to the contrary. Smithart v. State, supra. Measured by this standard we are wholly unable to find, as did the district court, that trial counsel's handling of the case was ineffective and inadequate, and resulted in the deprivation of constitutional rights. We turn to express our view in this regard.

[1]See: NRS 177.375(2)(b); Roseneau v. State, 90 Nev. 161, 521 P.2d 369 (1974); Johnson v. Warden, 89 Nev. 476, 515 P.2d 63 (1973); Craig v. Warden, 87 Nev. 39, 482 P.2d 325 (1971).

Preliminarily, we note that in October 1969, Lischko and William McCoole jointly were charged with having kidnapped one, Dean Petersen, for the purpose of ransom. Lischko retained private counsel. McCoole was represented by the Public Defender of Washoe County. Neither defendant testified at the trial. Each was convicted and sentenced to prison. Sometime later, a third participant in the offense, a Robert Sheridan, was apprehended, tried and convicted. Lischko's appeal to this court was denied. Almost three years later, this post-conviction proceeding was commenced in which, for the first time, trial counsel is charged with incompetency. The charge is premised mainly upon the fact that counsel elected not to have Lischko testify on his own behalf and tell the story that the whole affair was a hoax planned by the victim's sister, Faye Petersen.

At the evidentiary hearing counsel stated several reasons for his decision not to offer Lischko as a witness. Faye Petersen, who according to Lischko, set up the kidnapping plot, was the person who initiated steps which culminated in a report to law enforcement and the subsequent arrests. Counsel could not square that conduct on her part with his client's tale that she had planned the hoax. Moreover, counsel knew of a recorded statement given by Lischko after his arrest to the district attorney, which could be used to impeach Lischko were he to testify. Finally, the private investigator counsel had hired before trial in an effort to uncover evidence to corroborate Lischko's story found nothing of value. For these reasons and others counsel elected not to offer Lischko as a witness.

Counsel had practiced law for many years and had extensive experience in the handling of criminal cases. Contrary to the view of the district court, we find it quite impossible at this late date to declare counsel's trial strategy an indicia of ineffective or inadequate representation.

The lower court apparently gave weight to the following bits of evidence in deciding that Lischko should have another trial. Lischko testified that he wished to take a lie detector test before trial, but that his counsel would not permit him to do so. Counsel did not recall Lischko having expressed that wish. In April 1972 long after the trial, a lie detector test was administered to Lischko and the examiner was of the opinion that his responses to questions were truthful. This was followed in May 1972 by an interview of Lischko while under sodium amytal and the doctor concluded "that the descriptions given are at a high level of validity." Although the results of those tests may weigh in favor of the petitioner's truthfulness, neither narco-interrogation nor the lie detector method has received court recognition as possessing the trustworthiness and reliability needed to accord the results the status of competent evidence. Vol. 3A, Wigmore, Chadbourn Revision, §§ 998, 999 (1970). Moreover, it is evident that the test results have no bearing at all upon the charge that trial counsel was ineffective. Counsel accepted his client's story as the truth and urged the defense of a hoax during his closing argument to the jury. Had the test results been available before trial, they would not have been admissible evidence during trial, nor may we assume that counsel's

decision not to offer Lischko as a witness would have been altered thereby.

Finally, the district court believed that counsel failed to adequately investigate the case before trial. The record does not demonstrate this to be so. It reveals only that counsel hired a private investigator who was unable to corroborate Lischko's story of a hoax. The investigator's reports are not in the record. We are not informed as to the details of his work, nor as to the extent of his investigation. There was nothing of substance before the court upon which it properly could charge counsel with an inadequate pretrial investigation.

In short, the record before us does not show by clear and convincing evidence that counsel's representation was of such low caliber as to reduce the trial to a sham, a farce, or a pretense.

Reversed.

BATJER, J., and COMPTON, D.J., and MCDANIEL, D.J., concur.

MOWBRAY, J., dissenting:

Respectfully, I dissent.

This is an appeal from an order of the district court granting Joseph Lischko's petition for post-conviction relief and ordering a new trial.

Lischko was tried before a jury and convicted of first-degree kidnapping. He was sentenced to serve 20 years in the Nevada State Prison. At the time of his arrest, Lischko secured private counsel, who represented him throughout his trial. Lischko did not take

the stand, nor were any witnesses called in his behalf. His conviction was appealed by court-appointed counsel. This court affirmed, rejecting the issues upon which the direct appeal was then predicated. Lischko v. State, 87 Nev. 493, 489 P.2d 89 (1971).

On July 20, 1972, Lischko, through his present counsel, filed a petition for post-conviction relief in the district court. He claimed that he was denied effective assistance of counsel during his jury trial, in derogation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution.

The petition was heard before the late Judge Emile Gezelin, who had presided at Lischko's jury trial. Judge Gezelin, after conducting an extensive evidentiary hearing, held that the petition was meritorious and granted Lischko a new trial. He specifically found that Lischko's trial counsel had failed to properly investigate certain alleged facts and circumstances which, because they would have gone to the impeachment of statements made by the prosecution's witnesses, fatally impaired counsel's ability to make informed decisions on behalf of his client. The judge carefully distinguished between those cases involving failure to make a careful *inquiry* in order to present an adequate defense, and those cases where counsel, having made such an inquiry, then made tactical or strategic errors in his handling of the case. Judge Gezelin did not consider the evidence presented to him at the post-conviction relief hearing in a vacuum, but rather against the background of the entire case. He presided over the trial resulting in

the conviction of Lischko, and he thereafter determined, in light of all the facts before him, from his impressions at the trial, and from the evidence produced at the hearing, that Lischko's basic rights had been violated.[1]

The majority would now substitute its opinion on a factual determination as to the effectiveness of counsel for that of the trial judge in his role as trier of fact. This court, in State v. Sorenson, 73 Nev. 218, 315 P.2d 508 (1957), cited and quoted with approval People v. Canfield, 173 Cal. 309, 159 P. 1046, 1047:

". . . 'It was for the judge of the trial court to say what had been the effect of the evidence upon the jury, and whether or not the defendant, *in view of all the facts,* had been given a fair trial. . . . The judge, who presided at the trial of the cause, who heard the testimony, who observed the jurors and had an opportunity also of testing the truth of the defendant's statements by noticing his demeanor, was in a peculiarly favorable position for determining justly the question whether or not the defendant had been accorded a fair trial. . . . *We can hardly manufacture in fancy an hypothetical situation in which*

---

[1]Juge Gezelin ruled, *inter alia,* in his decision:

"It was the Judge of this court who presided at the original trial. The impressions received at the original trial and which are now supplemented with the allegations of the petition, together with evidence preesnted at the evidentiary hearing[,] convince the Court that the matters complained of resulted from a failure on the part of counsel to adequately inquire and investigate facts and circumstances in order to be in a position to make informed decisions on behalf of his client. Counsel's decisions based upon lack of information denied the petitioner the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution."

a reviewing court would be justified in questioning the discretion of the trial court who should grant a new trial in a case involving a criminal charge. . . .'" (Emphasis added.) State v. Sorenson, *supra,* at 223-224. See also, State v. Varga, 66 Nev. 102, 124, 205 P.2d 803 (1949).

The views expressed in Sorenson parallel my position in this case. We know nothing regarding the ultimate merit of Lischko's story, but we do know that the trial judge, who presided at Lischko's jury trial and who sentenced him to the state penitentiary, did conclude, after carefully considering Lischko's petition and the evidence adduced at the hearing thereon, that justice demanded Lischko be given a new trial. In the conceded absence of any judicial irregularity, I would not interfere with that conclusion.

A review of the record below shows no abuse of discretion by the district judge, but, rather, substantial evidence to support his order. In my opinion, such an order should not be disturbed on appeal. Wallace v. State, 88 Nev. 549, 550, 501 P.2d 1036 (1972). I would affirm the order of the district court granting the petition for post-conviction relief and ordering a new trial.

Appendix "D"

In the United States District Court
for the District of Nevada

Civil No. R-74-118 BRT

Joseph Lischko,
Petitioner,
vs.
Robert J. Galli, Sheriff of Washoe County, State of Nevada,
Respondent.

[Filed March 24, 1975]

ORDER

In this petition for a writ of habeas corpus, Petitioner, Joseph Lischko, seeks to overturn a decision of the Supreme Court of Nevada (*Warden v. Lischko,* June 10, 1974, Docket No. 7088, 523 P.2d 6). In a post-conviction petition, Lischko had sought relief from his kidnapping conviction in the state trial court, alleging that his constitutional right to adequate representation by counsel had been infringed. The state trial court held a post-conviction evidentiary hearing, and at the conclusion, decided that Petitioner's right to due process under the Fourteenth Amendment and his right to adequate representation by counsel under the Sixth Amendment

had, indeed, been violated. The conviction was set aside and a new trial ordered. The state appealed and the Supreme Court reversed, holding that the evidence did not support the findings and conclusions of the trial court. The facts are correctly summarized in the Supreme Court opinion, *supra.*

This Court held another evidentiary hearing. The information elucidated added little to the record theretofore made in the state post-conviction hearing. This Court did have an opportunity to observe Lischko as a witness and finds that his credibility is subject to serious question. This probably is due as much to ineptness and the basic unbelievability of some of his statements as to a desire wilfully to testify falsely.

The conclusions reached by the Nevada Supreme Court cannot be successfully attacked upon a theory that that Court was bound to accept the findings and conclusions of the trial court. For example, in *La-Vallee v. Delle Rose,* 410 U.S. 690 (1973), a federal district court had held an evidentiary hearing and upset a conviction upon the ground that confessions received in evidence were involuntary. The Court of Appeals affirmed, but the Supreme Court of the United States reversed and held that the federal courts were bound to honor the contrary finding after an adequate evidentiary hearing in the state court. In *Murch v. Mottram,* 409 U.S. 41 (1972), the High Court again undertook to weigh and analyze the quality of the evidence to support a lower court finding and reversed a reversal by the Court of Appeals.

The primary thrust of Petitioner's argument is that the Nevada Supreme Court applied an incorrect legal standard in assessing the validity of Petitioner's contention under the Sixth Amendment and that Judge Gezelin in the trial court had applied a correct legal standard.

The Ninth Circuit has been in the vanguard of courts which have used the phrase "a farce and a mockery" in assessing the quality of an attorney's performance in the representation of his client. *Stanley v. United States,* 239 F. 2d 765 (9th Cir. 1957); *Peck v. United States,* 321 F. 2d 934 (9th Cir. 1963); *Wright v. Craven,* 412 F. 2d 915 (9th Cir. 1969); *Grove v. Wilson,* 368 F. 2d 414 (9th Cir. 1966). On the other hand, this phrase, however it may be applied in the context of particular circumstances, has not always been used without qualification. As early as 1963, Judge Browning, writing for the Court in *Brubaker v. Dickson,* 310 F. 2d 30 (9th Cir. 1963), said that a defendant is entitled to "effective aid in the preparation and trial of the case" and that due process requires counsel "reasonably likely to render *and rendering* reasonably effective assistance." While the words "farce and mockery of justice" continue to be used, recent cases have added the explanation: "To demonstrate inadequacy of counsel, a petitioner must show that he had counsel who was not reasonably likely to render and did not render reasonably effective assistance." *Loano v. United States,* 457 F. 2d 1208 (9th Cir. 1972); *United States v. Miramon,* 470 F. 2d 1362 (9th Cir. 1972).

Petitioner cites the case of *Beasley v. United States,* 491 F. 2d 687 (5th Cir. 1974), for the proposition that the standard applied by the Nevada Supreme Court was wrong and much too restrictive. A similar comprehensive discussion of the problem is found in *United States v. DeCoster,* 487 F. 2d 1197 (D.C. Cir. 1973). These decisions seem to track the concepts express in the *Brubaker* case, *supra.*

The Nevada Supreme Court said:

> "The standard by which such a claim is to be tested is whether the effectiveness of counsel was of such low caliber as to reduce the trial to a sham, a farce, or a pretense. Layton v. State, 87 Nev. 598, 602, 491 P. 2d 45 (1971); Smithart v. State, 86 Nev. 925, 931, 478 P. 2d 576 (1970); Bean v. State, 86 Nev. 80, 92, 465 P. 2d 133 (1970.) It is presumed that counsel fully discharged his duties, and that presumption can only be overcome by strong and convincing proof to the contrary. Smithart v. State, supra. Measured by this standard we are wholly unable to find, as did the district court, that trial counsel's handling of the case was ineffective and inadequate, and resulted in the deprivation of constitutional rights. We turn to express our view in this regard." *Warden, Nevada State Prison v. Lischko,* 523 P. 2d 3.

It may well be that the standard as so enunciated is excessively harsh, especially if a literal meaning is accorded the words used. For the purposes of this decision, we adopt the principle that a petitioner has the burden of showing that he had counsel who was

not reasonably likely to render and did not render reasonably effective assistance.

It is conceded that Petitioner's retained counsel, Carl Mart aro, was a competent, experienced criminal defense attorney. The attack on the quality of his performance falls far short of a showing that reasonably effective assistance was not rendered. The *Beasley* and *DeCoster* cases, supra, state facts showing that counsel was just barely on the job. He was physically present and that is about all. By contrast, in the instant case counsel did investigate, did prepare, and did make informed tactical decisions. The facts in this respect have been correctly related by the Nevada Supreme Court.

Parenthetically, it may be observed that Petitioner's reliance upon the exchange of notes between himself and a co-defendant while in jail, this evidence having been submitted at the state post-conviction hearing, is difficult for this Court to understand. They seem to me to be an effort to agree upon a story in defense of the charge rather than an unequivocal assertion of innocence, and they seem to impugn, rather than to support, the defense theory of a hoax. Accordingly,

It Hereby Is Ordered that a judgment shall be entered denying the petition for a writ of habeas corpus.

Dated: March 24, 1975.

/s/ Bruce R. Thompson
United States District Judge

In the United States District Court
for the District of Nevada

Civil No. R-74-118 BRT

Joseph Lischko,
Petitioner,
vs.
Robert J. Galli, Sheriff of Washoe County, State of Nevada,
Respondent.

[Filed March 24, 1975]

JUDGMENT

In accordance with the Order this day entered in the action entitled above,

It Hereby Is Ordered, Adjudged And Decreed that the petition for a writ of habeas corpus is denied.

Dated: March 24, 1975.

/s/ Bruce R. Thompson
United States District Judge

Appendix "E"

Do Not Publish

United States Court of Appeals
for the Ninth Circuit

No. 75-2525

Joseph Lischko,
Petitioner-Appellant,
vs.
Robert J. Galli, Sheriff of Washoe County, State of Nevada,
Respondent-Appellee.

[April 14, 1976]

Appeal from the United States District Court
for the District of Nevada

MEMORANDUM

Before: DUNIWAY and WALLACE, Circuit Judges, and SWEIGERT,* District Judge.

Lischko asserts that his attorney did not investigate the possibility that the kidnapping of Dean Peterson was a hoax in which Faye Peterson, Dean's sister, had participated. Lischko claims that he informed his attorney that both Dean and Faye Peterson were involved in the kidnapping. The attorney testified that

*The Honorable William T. Sweigert, Senior United States District Judge for the Northern District of California, sitting by designation.

Lischko never implicated Dean, telling him only that the scheme was Faye's idea. The district judge's decision to believe the attorney and Lischko is supported by the evidence.

Lischko argues that he was deprived of an adequate defense by his attorney's failure to call him as a witness. We do not agree. The attorney concluded, as did the district court, that Lischko's "credibility is subject to serious question." Rather than presenting his client's incredible tale, the attorney focused his energies on discrediting prosecution witnesses in the hope of raising a reasonable doubt of guilt. In retrospect, Lischko could have done no worse had he testified, but that is not the standard by which we evaluate a lawyer's performance.

> To demonstrate inadequacy of counsel, a petitioner must show that he had counsel who was not reasonably likely to render and did not render reasonably effective assistance.

Leano v. United States, 9 Cir., 1972, 457 F.2d 1208, 1209, *cert. denied,* 409 U.S. 889; *see Brubaker v. Dickson,* 9 Cir., 1962, 310 F.2d 30, 37, *cert. denied,* 1963, 372 U.S. 978. Lischko has made no such showing.

The Nevada Supreme Court's use of the "sham, farce, or pretense" test in disposing of Lischko's state habeas corpus petition, *Warden v. Lischko,* ..... Nev. ....., 523 P.2d 6, is not this court's concern. We need only determine, as we have, that the district court based its conclusion on a correct view of the law and facts. It did.

Affirmed.

Appendix "F"

United States Court of Appeals
for the Ninth Circuit

No. 75-2525

Joseph Lischko,
Petitioner-Appellant,
vs.
Robert J. Galli, Sheriff of Washoe County, State of Nevada,
Respondent-Appellee.

[Filed June 19, 1976]

ORDER

Before: DUNIWAY and WALLACE, Circuit Judges, and SWEIGERT,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

*The Honorable William T. Sweigert, Senior United States District Judge for the Northern District of California, sitting by designation.

Supreme Court, U. S.
FILED
AUG 16 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-49

JOSEPH LISCHKO,

Petitioner,

vs.

ROBERT J. GALLI, Sheriff of Washoe County, State of Nevada,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT LIST
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State of Nevada

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Counsel for Respondent

1[10]

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1976

JOSEPH LISCHKO, Petitioner, vs. ROBERT J. GALLI, Sheriff of Washoe County, State of Nevada, Respondent.	No. 76-49

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The unreported ~~memorandum~~ opinion of the United States Court of Appeals for the Ninth Circuit appears in the petition in Appendix E. The decision of the United States District Court for the District of Nevada is

printed in Appendix D of the petition. The reports of decisions in the state courts appearing in Appendices A, B and C of the petition are immaterial.

JURISDICTION

The statutory provision cited by petitioner--28 U.S.C.A. 2254(1)--confers no jurisdiction upon this Court to entertain the petition.

QUESTIONS PRESENTED FOR REVIEW

The questions propounded for review by the petitioner do not raise justiciable issues. Errors, if any, occurring in the course of post-conviction review in the state system were rendered moot by the de novo evidentiary proceedings conducted at the federal level upon Mr. Lischko's petition for writ of habeas corpus.

Petitioner has not presented the only question of possible concern to this Court. That issue might have been phrased: Whether the standard adopted by the district court and affirmed by the Court of Appeals to evaluate the efforts of defense counsel correctly reflects the mandate of the Sixth Amendment?

STATEMENT OF THE CASE

Mr. Lischko seeks, by way of his petition, a review of the judgment of a federal court. The United States District Court for the District of

Nevada first obtained jurisdiction in the matter by way of a petition for writ of habeas corpus pursued by Mr. Lischko under authority found in 28 U.S.C. § 2254.

In early 1970, with the assistance of retained counsel, the petitioner, Joseph Lischko, was tried in state court for the crime of kidnapping. He was convicted and sentenced to serve 20 years in the Nevada State Prison. Through a different appointed counsel, he appealed the judgment to the Nevada Supreme Court. The conviction was affirmed in Lischko v. State, 87 Nev. 493, 589 P.2d 89 (1971).

With the aid of yet another attorney, his present counsel, the prisoner next returned to the trial court to seek post-conviction relief pursuant to the Nevada statutory scheme. NRS 177.315 et seq. There, he raised in issue for the first time the adequacy of his representation at trial. The Court agreed with his contentions, and a new trial was ordered. The State appealed.

A 4-1 majority of the Nevada Supreme Court concluded that the record was insufficient to support the decision of the lower court. Mr. Lischko failed to demonstrate "by clear and convincing evidence that counsel's representation was of such a low caliber as to reduce the trial to a sham, a farce or a pretense." Warden v. Lischko, 90 Nev. 221, 224-225,

523 P.2d 6 (1974).

By way of petition for writ of habeas corpus in federal district court, Mr. Lischko argued that the test adopted by the Nevada Supreme Court was unduly harsh and that he had not in fact received competent assistance of counsel. In addition to reviewing the records of state proceedings, the Court conducted an evidentiary hearing. The substance of testimony received from Mr. Lischko is reflected in the petitioner's present statement of the case under the label "Facts." Absent from that statement, however, is the substance of testimony received in district court which controverted the petitioner's position. Further, and more importantly, Mr. Lischko's retained counsel explained what he had done on his client's behalf and why he had not attempted some of the things the petitioner now describes as essential. It was conceded at the hearing that the original counsel was an accomplished, experienced defense attorney.

Thus informed, the Court concluded that counsel "did investigate, did prepare, and did make informed tactical decisions" in conducting defense of the petitioner. In light of such findings, the Court determined, as a matter of law, that Mr.Lischko failed to carry "the burden of showing that he had counsel who was not reasonably likely to render, and did not render, reasonably effective assistance." Appendix D of the Petition,

pp. xvi-xxvii.

Mr. Lischko sought a review by the Court of Appeals for the Ninth Circuit. It was there decided that the district court had based its conclusion on a correct view of the law and facts. A petition for rehearing was denied, and a suggestion for rehearing en banc was rejected on June 19, 1976. His present petition followed.

ARGUMENT

THE STANDARD ADOPTED BY THE DISTRICT COURT AND AFFIRMED BY THE COURT OF APPEALS TO EVALUATE ITS FACTUAL DETERMINATION OF THE EFFORTS OF COUNSEL EXPENDED ON PETITIONER'S BEHALF AT TRIAL WAS CORRECT, REASONABLE, WORKABLE AND CONSISTENT WITH THE DECISIONS OF THE OTHER CIRCUITS.

The petitioner, Mr. Lischko, was afforded a de novo evidentiary hearing in U. S. District Court upon his petition for writ of habeas corpus. The Court thereupon made findings of fact and reached conclusions of law independent of any prior state proceeding on the issue of adequate representation of counsel. Shortcomings in the Nevada system, if there be any, are therefore academic. The issues now raised by the petitioner in this regard are moot.

At the hearing, it was conceded that Lischko's trial counsel was an excellent lawyer with substantial experience in criminal law. Conflicting testimony was heard regarding his performance in this particular trial. Mr. Lischko continues to argue for the quality and quantity of the evidence which might indicate inactivity or incompetence. He does not argue, however, nor can he, that there was heard insufficient evidence to support the findings of the Court that the trial counsel did investigate, did prepare and did make informed tactical decisions in the conduct of the trial. The only viable question that can be raised, therefore, is whether the Court measured its findings of counsel performance against the proper constitutional standard. The respondent submits it did. Respondent further submits that the standard adopted by the Court, and affirmed by the Court of Appeals for the Ninth Circuit, neither conflicts with any decision of this Court, nor is it inconsistent with the decisions of the other courts of appeal.

For many years, the courts have described a constitutionally inadequate performance by defense counsel as one which reduces the proceedings to a mockery of justice. The Ninth Circuit has been in the forefront of courts using this standard. Stanley v. United States, 239 F.2d 765 (9th Cir. 1957); Peck v. United States, 321 F.2d 934 (9th Cir. 1963). Other circuits have also used the term and continue to do so. See Ruse v.

United States, 379 F.2d 113 (D.C. 1967); United States v. Yaneshefsky, 500 F.2d 1327 (2d Cir. 1974), quoting United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied 338 U.S. 950 (1950)

The words "farce", or "mockery" are admittedly not words of precision. The courts of various circuits--and the same courts at various times--have qualified, amplified and clarified the meaning of the terms. The petitioner contends that because courts have used different language in this effort, there exists conflicting standards among the circuits which must be resolved by this Court. That is not the case; the words may differ, but the concept adopted by the district court and affirmed by the Ninth Circuit in the case at bar is very much like the test used throughout the country.

A common thread found in all decisions known to the respondent is that much more than mere allegations of inadequate counsel is required before a conviction will be overturned. In the instant case, the district court held that Mr. Lischko had "the burden of showing" ineffective assistance of counsel. Another court has held the same thing, in effect, by saying there exists "a presumption that counsel is competent which must be overcome by the petitioner..." McQueen v. Swenson, 498 F.2d 207, 216 (8th Cir. 1974). Another has described the burden as the "stringent

standard to be met to show inadequacy of counsel." United States v. Maxie, 462 F.2d 474, 483 (2d Cir. 1974).

What the petitioner must show has also been expressed in varied terms, but all convey a theme similar to the aforementioned "farce" or "mockery" test. One court described a constitutionally inadequate counsel as one who was "transparently inadequate." Root v. Cunningham, 344 F.2d 1 (4th Cir. 1965). Another court determined that the Sixth Amendment is offended only when a "strong showing is made that the conduct of counsel virtually deprived defendant of a trial..." United States v. Bella, 353 F.2d 718, 179 (7th Cir. 1965); quoted in United States v. Robinson, 502 F.2d 894 (7th Cir. 1974).

None of these terms, it is submitted, were intended to be construed literally. In Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), the Court made clear a defendant is entitled to counsel. This has never been construed to mean perfect counsel; it has never been held that the performance of counsel, when viewed from hindsight, must be error free. A defendant is only entitled to a lawyer who makes a lawyer-like effort. This was the standard adopted in the case at bar and the one utilized throughout the circuits. Mr. Lischko was entitled to a counsel reasonably likely to render, and rendering, reasonably effective assistance. West v.

Louisiana, 478 F.2d 1026 (5th Cir. 1973); Moore v. United States, 432 F.2d 730 (3rd Cir. 1970); United States v. Beaseley, 491 F.2d 687 (6th Cir. 1974). After close scrutiny of the facts in question, the lower courts determined that the caliber of assistance received by Mr. Lischko conformed, at the very least, with this mandate.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 11th day of August, 1976.

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Supreme Court, U. S.
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No. 76-49

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v.

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State of Nevada,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONSE TO BRIEF OF RESPONDENT IN OPPOSITION

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RESPONSE TO BRIEF OF RESPONDENT IN OPPOSITION

Petitioner feels compelled to respond to the Brief of Respondent in Opposition for the reason that respondent states that there was a "*de novo* evidentiary proceedings conducted at the federal level upon Mr. Lischko's petition for writ of habeas corpus".

This is not the fact.

The fact is that in his Petition for Habeas Corpus, in Paragraph VII thereof, the following request was made to the Federal District Court:

"Because of the foregoing petitioner is being restrained of his liberty by the State of Nevada in violation of the Constitution of the United States and he therefore prays that a Writ of Habeas Corpus be granted; that at the time of the hearing of the Writ he be permitted to offer evidence in addition to that presented before the State Court on the question of competency of counsel at the trial of his case; and further that he be allowed to introduce at the hearing on the Writ a transcript of the testimony taken before Judge Emile Gezelin of the State District Court in and for the County of Washoe in the Post-Conviction Relief hearing, together with copies of all exhibits admitted before Judge Gezelin at that hearing."

That the respondent opposed the request to offer evidence in addition to that presented to the trial court and the court then ruled that an evidentiary hearing would be held.

It was never understood by petitioner or his counsel the writer of this reply brief, that a full scale hearing would be had and it appears from the record the complaining witnesses, Dean Petersen and his sister, were not called. Neither were numerous other witnesses that appeared at the trial. Petitioner and his counsel, believing that this was a hearing limited to adding testimony to what was taken before the state trial judge, Judge Gezelin, did not present a full scale hearing before the Federal District Judge.

Since the only person who observed the conduct of Petitioner's counsel at his trial and observed the con-

duct of the complaining witnesses and other witnesses at that trial, it is doubtful that a full scale hearing before the Federal District Court could now fairly be had. The question of the credibility of the petitioner referred to by the Federal District Judge is not an issue and would only become an issue if petitioner is granted the new trial which he had been seeking, at which time he can be granted a full scale hearing in the appropriate form.

The Writ should be granted.

Dated, Reno, Nevada,
August 24, 1976.

Respectfully submitted,
VARGAS, BARTLETT & DIXON,
JOHN C. BARTLETT,
Attorneys for Petitioner.